

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SHERRI CAPPELLI, ROBERT	:	
CAPPELLI AND ANDREW CAPPELLI,	:	
Individually and as the Administrators	:	
And Personal Representatives of the	:	
ESTATE OF RICHARD CAPPELLI	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 98-CV-5983
HAVERFORD TOWNSHIP,	:	
HAVERFORD TOWNSHIP POLICE	:	
DEPT., DENNIS DONNELLEY, KEITH	:	
GILMAN, PETER BOGUTZ, JOHN	:	
VIOLA, MICHAEL FLYNN, ROBERT	:	
MURPHY, And STEVEN FORTOW,	:	
Individually and in their capacity as Police	:	
Officers in the Haverford Township Police	:	
Dept., DEFENSE TECHNOLOGY CORP.	:	
OF AMERICA and ARMOR	:	
HOLDINGS, INC.	:	
Defendants.	:	

MEMORANDUM

GREEN, S.J.

September , 2000

Presently before the court is Defendants Haverford Township and Officers Dennis Donnelley, Keith Gilman, Peter Bogutz, John Viola, Michael Flynn, Robert Murphy and Steven Fortow's unopposed Motion for Summary Judgment on Counts I and III of Plaintiffs' Complaint. For the following reasons, Defendants' motion will be granted on both counts.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs allege that on or about January 9, 1997, decedent Richard Cappelli was inside a bar located at 1901 Old West Chester Pike, Haverford, Pennsylvania when he was approached by the Defendant Officers. A physical confrontation ensued between Defendant Officers and

Richard Cappelli, wherein Defendant Officers “repeatedly and unnecessarily sprayed Richard Cappelli’s face, nose, mouth, eyes and throat with pepper spray.” (Compl. ¶ 17.) Plaintiffs allege that the pepper spray attacks “occurred while Richard Cappelli was standing, while he was on the ground, and while he was on the ground in the prone position, with his hands and feet restrained behind his back. The Officers restrained Richard Cappelli by physical force and with handcuffs.” (Compl. ¶ 18-19.) Plaintiffs further allege that as a result of said events, Richard Cappelli died on January 9, 1997.

Plaintiffs, as administrators of the Estate of Richard Cappelli, filed a Civil Complaint against Defendants Haverford Township, Haverford Township Police Department, and the Defendant Officers under 42 U.S.C. Section 1983 alleging use of excessive force in violation of Mr. Cappelli’s Fourth Amendment Rights.¹ In Count I of the Complaint, Plaintiffs allege that Defendant Haverford Township was aware or should have been aware of the inherent dangers created when pepper spray is utilized in conjunction with the restraint techniques that were pursued against Richard Cappelli and that Defendant Haverford Township failed to properly instruct, train, and supervise Defendant Officers. (Compl. ¶¶ 21-22, 37-38.) Furthermore, in Count III, Plaintiffs allege that Defendant Officers acted in conformity with the practices, policies and customs of Defendant Haverford Township, and those practices, policies and customs were unconstitutional in that the conduct of Defendant Officers constitutes excessive force in violation of the Fourth Amendment of the Constitution of the United States. (Compl. ¶¶

¹Plaintiffs also brought products liability and wrongful death claims against Defendants Defense Technology Corporation of America and Armor Holdings, Inc. All claims against Haverford Township Police Department were dismissed as the Police Department was not alleged to be a separate legal entity subject to suit.

25-26, 40-42.)

On May 15, 2000, Defendants Haverford Township and Officers filed a Motion for Summary Judgment with respect to Counts I and III. On July 10, 2000, I entered an Order granting Plaintiffs a 10-day extension to respond to Defendants' Motion. Plaintiffs failed to respond.

II. DISCUSSION

Summary judgment shall be awarded “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Once the moving party has carried the initial burden of showing that no genuine issue of material fact exists, the non-moving party cannot rely on conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact. Pastore v. Bell Telephone Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994). The nonmoving party, instead, must establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file. Id. (citing Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)); see also Fed. R. Civ. P. 56(e). The evidence presented must be viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

In the present case, Defendants assert that Defendant Officers are entitled to Summary Judgment on Count III because there is no evidence that Defendant Officers violated Richard

Cappelli's Fourth Amendment rights. (Defs.' Mem. Supp. Summ. J. at 7.) Defendants proffer deposition testimony of Defendant Officers, as well as an expert opinion, to support their claim that the Defendant Officers did not use excessive force in administering pepper spray on Richard Cappelli and restraining him thereafter. (Defs.' Ex. E-I; Ex M.) The testimony also refutes Plaintiffs contention that pepper spray was used on Richard Cappelli after he was in the prone position. (Defs.' Ex. H, p. 62-72; Ex. I, p. 39-48.)

By presenting such evidence, Defendants have met their initial burden of showing that there is no genuine issue of material fact regarding Plaintiffs' claim that Defendant Officers violated Richard Cappelli's Fourth Amendment Rights. Thus, the burden shifts to Plaintiffs to introduce evidence to the contrary. Plaintiffs, however, failed to respond to Defendants' Motion for Summary Judgment or produce any evidence to support their Fourth Amendment claim. Plaintiffs, as the non-moving party, cannot rely on conclusory allegations in the Complaint to establish a genuine issue of material fact. Pastore, 24 F.3d at 511. Plaintiffs must establish the existence of material elements of their claim to survive a motion for summary judgment. Because Plaintiffs have failed to meet their burden, Defendant Officers Motion for Summary Judgment on Count III will be granted.

Defendants also seek Summary Judgment on Count I of Plaintiffs' Complaint on grounds that Plaintiffs failed to set forth sufficient evidence to support their claim that Defendant Haverford Township failed to properly instruct, train and supervise Defendant Officers in correct procedure for administering pepper spray and restraining individuals who have been sprayed. (Defs.' Mem. Supp. Summ. J. at 14.) Defendants assert two independent grounds to support their motion. First, Defendants argue that Defendant Haverford Township cannot be liable for

failing to train its officers because a municipality cannot be held liable under Section 1983 for violating an individual's rights as a result of a municipal policy or practice unless one of the municipality's employees is "primarily liable under Section 1983 itself." (Defs.' Mem. Supp. Summ. J. at 14.) (citing Williams v. Borough of West Chester, 891 F.2d 458, 467 (3rd Cir. 1989)). Defendants contend that Defendant Officers, as employees of Haverford Township, are not liable under Section 1983. Second, Defendants argue that even if liability is imposed against Defendants Officers, Plaintiffs are still unable to demonstrate that the Township itself, through the implementation of a policy or custom, violated the Constitution. (Defs.' Mem. Supp. Summ. J. at 14-15.)

Defendants correctly state that a municipality cannot be held liable under Section 1983 for violating an individual's rights as a result of a municipal policy or practice unless one of the municipality's employees is "primarily liable under Section 1983 itself." See Williams, 891 F.2d at 467. Moreover, there is no evidence of such a policy or custom. In light of the previous discussion granting summary judgment in favor of Defendant Officers, Plaintiffs are unable to maintain a Section 1983 action against Haverford Township. Thus, Defendants have met their initial burden of showing that there is no genuine issue of material fact regarding Haverford Township's liability to the Plaintiffs. To survive Defendants' motion, Plaintiffs had the burden to introduce some evidence of a Section 1983 violation. Plaintiffs failed to produce any evidence to support their claims. Accordingly, Defendant Township Motion for Summary Judgment will be granted as to Count I.

III. CONCLUSION

Plaintiffs failed to produce any evidence to substantiate the allegations set forth in their Complaint against Defendants Haverford Township and Officers or to refute the facts presented in Defendants' Motion for Summary Judgment. Specifically, Plaintiffs failed to raise a genuine issue to establish (1) that Defendant Officers violated Richard Cappelli's rights under the Fourth Amendment, (2) that Defendant Haverford Township failed to properly instruct, train and supervise Defendant Officers in correct procedure for administering pepper spray, or (3) that Defendant Haverford Township enforced an unconstitutional policy or custom. Plaintiffs failed to produce sufficient evidence for a reasonable jury to conclude in their favor. Accordingly, Defendants' unopposed Motion for Summary Judgment will be granted.

An appropriate order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SHERRI CAPPELLI, ROBERT	:	
CAPPELLI AND ANDREW CAPPELLI,	:	
Individually and as the Administrators	:	
And Personal Representatives of the	:	
ESTATE OF RICHARD CAPPELLI	:	
Plaintiffs,	:	CIVIL ACTION
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v.	:	
	:	No. 98-CV-5983
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MURPHY, And STEVEN FORTOW,	:	
Individually and in their capacity as Police	:	
Officers in the Haverford Township Police	:	
Dept., DEFENSE TECHNOLOGY CORP.	:	
OF AMERICA and ARMOR	:	
HOLDINGS, INC.	:	
Defendants.	:	

ORDER

AND NOW, this day of September, 2000, upon consideration of Defendants
Haverford Township and Officers Dennis Donnelley, Keith Gilman, Peter Bogutz, John Viola,
Michael Flynn, Robert Murphy and Steven Fortow's unopposed Motion for Summary Judgment
on Counts I and III, IT IS HEREBY ORDERED that Defendants' Motion is GRANTED.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.
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Dept., DEFENSE TECHNOLOGY CORP.	:	
OF AMERICA and ARMOR	:	
HOLDINGS, INC.	:	
Defendants.	:	

JUDGMENT

AND NOW, this day of September, 2000, Judgment is entered in favor of Defendants Haverford Township and Officers Dennis Donnelley, Keith Gilman, Peter Bogutz, John Viola, Michael Flynn, Robert Murphy and Steven Fortow and against Plaintiffs Sherri Cappelli, Robert Cappelli and Andrew Cappelli, Individually and as the Administrators and Personal Representatives of the Estate of Richard Cappelli.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.